STATE OF MICHIGAN

COURT OF APPEALS

NAEL ABOUNA and SACO NASSER,

Plaintiffs/Counter-Defendants,

v

MANUEL ZARAGOZA,

Defendant/Cross-Plaintiff/Counter-Plaintiff/Cross-Defendant-Appellant,

and

JOSEFINA ZARAGOZA,

Defendant/Cross-Plaintiff/Cross-Defendant,

and

EXPRESS SERVICES ENTERPRISES, INC.,

Defendant/Cross-Defendant-Appellee,

and

BUSINESS LOAN CENTER, INC.,

Defendant/Cross-Defendant/Cross-Plaintiff.

UNPUBLISHED
November 2, 2006

No. 262451
Wayne Circuit Court
LC No. 02-238988-CH

Before: Murray, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant/cross-plaintiff/counter-plaintiff/cross-defendant, Manuel Zaragoza (Manuel), appeals as of right a judgment in his favor and in favor of defendant/cross-plaintiff/cross-defendant, Josefina Zaragoza (Josefina), on their cross-claim against defendant/cross-defendant-

appellee, Express Services Enterprises, Inc. (Express), in this dispute over a promissory note, mortgage and other interests in real property. The judgment was entered in accordance with the trial court's findings made after a bench trial. We affirm in part, and remand.

I. Background

Manuel, as owner of the property,[1] leased it to plaintiffs/counter-defendants, Nasser Saco and Nael Abouna, by way of a lease that also gave Saco and Abouna the option to purchase the property. Manuel subsequently sought to sell the property to Express. Express ultimately purchased the property (giving a note and mortgage to Manuel and Josefina, as well as a note and mortgage to defendant/cross-plaintiff/cross-defendant Business Loan Center (BLC)) without obtaining a release of Saco's and Abouna's option to purchase, allegedly because Manuel misrepresented that such a signed release existed.

After a bench trial, the trial court found that Express owed Manuel and Josefina, under Express's note to them, $338,219.37. The trial court found that Manuel misrepresented the existence of a release, which was relied on by Express, causing Express damages in the amount of $142,000. The trial court set off the $142,000 owed by Manuel to Express against the $338,219.37 owed by Express to Manuel and Josefina. The trial court entered a judgment in favor of Manuel and Josefina, and against Express, in the amount of $196,218.25.

II. Analysis

A. Fraudulent Misrepresentation

Manuel first argues that the trial court erred in concluding that Express suffered compensable damages caused by his fraud. We disagree.

"Findings of fact by the trial court may not be set aside unless clearly erroneous." MCR 2.613(C). "In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). Following a bench trial, we review findings of fact for clear error, and review de novo the lower court's conclusions of law. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id*. (internal quotation marks and citation omitted). Moreover, we review equitable actions de novo. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997).

In general, actionable fraud must be predicated on a statement relating to a past or an existing fact. *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 638; 534 NW2d 217 (1995).

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[1] The property is located at 6200 West Vernor, in the city of Detroit.

> As a general rule, actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998) (citation omitted).]

Fraud must be proved by clear and convincing evidence and must never be presumed. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1996). But fraud may be established by circumstantial evidence. *Id*. at 458. "In other words, fraudulent or wrongful conduct may be inferred from other evidence." *Id*.

Manuel's argument that he did not commit fraud because promises of future conduct do not constitute fraud lacks merit because the evidence indicated that Manuel's misrepresentations concerned an existing fact, i.e., the existence of a release by Saco and Abouna. Specifically, Glen L. Valentine, an attorney for Express, testified that he and Belal A. Mheisen, president of Express, "had been requesting a release of the option to purchase for a long period of time and at the closing we – well, actually my client Mr. Mheisen, requested again of Mr. Zaragoza the release. *He [Manuel] said that his attorney had it* and that he would be getting it for Mr. Mheisen." After closing, Mheisen was told by Saco that there was no release. Thus, there was clear and convincing evidence supporting the trial court's conclusion that Manuel misrepresented the existing fact that at the time of closing Manuel's attorney had a release from Saco and Abouna. The trial court concluded that there was no release predating the closing from Saco and Abouna.[2] This conclusion, and the conclusion that Manuel misrepresented this fact, are not clearly erroneous.[3]

B. Causation of Damages

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[2] The trial court found that no release from before the closing has ever been presented or found, and that the only release is from August 2004, signed by Saco and Abouna to settle their portion of this case.

[3] Even if Manuel's misrepresentations concerned future conduct, i.e., that he would procure a release from Saco and Abouna, such representations were made under circumstances in which Express would reasonably be expected to rely upon them and continue with the closing. According to Valentine's testimony Manuel knew that Mheisen had been requesting the release for some time, and the closing had been delayed for a long time. Manuel should have known that a misrepresentation of the existence of a release of that option, under those circumstances, would induce Express into reliance upon the existence of the release. Accordingly, there was also sufficient evidence to establish that Manuel committed fraud in the inducement. See *Begola Servs*, *supra* at 639 (recognizing that fraud in the inducement "occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon").

Although there were ample facts in the record supporting the trial court's holding on liability, not so with regard to damages. The trial court's $142,000 damage award had two components: (1) $37,500 representing the amount paid by Express to, in part, obtain the release of the option to purchase held by Sacco and Abouna, and (2) $104,500, representing interest paid by Express on the mortgage for the entire parcel from June 14, 2001 to the date of trial.

In fraud cases, like many other types of cases, a plaintiff must prove that the fraud committed actually caused the damage suffered. *Rosenblatt v John F Ivory Storage Co*, 262 Mich 513, 517; 247 NW 733 (1933). Damages must be proven with reasonable certainty, and a plaintiff may only recover those damages that are the direct, natural and proximate result of the fraud. *Findlater v Dorland*, 152 Mich 301, 308; 116 NW 410 (1908).

Here, we have no hesitation affirming the trial court's decision to award Express, through a deduction to the amount owed Manuel, the $37,500 it paid to Sacco and Abouna. Although the first amended complaint filed by Sacco and Abouna focused on the allegedly fraudulent subordination agreement, the actual settlement agreement indicated that the payment was a consideration for Sacco and Abouna releasing their option to purchase. Because the trial court found that Manuel misrepresented to Express the existence of the release, which then resulted in the litigation and settlement, this payment was a natural and direct result of the fraud committed by Manuel.

After that finding, however, the record supporting the trial court's remaining damage award is much less clear. As the trial court recognized, Express provided no evidence on lost opportunities, lost profit, or any other measurable form of damage caused by the fraud. And, although Express provided very general testimony that it could not refinance, sell or develop the property while the clouded title existed on the two Zaragoza lots, that was not enough evidence to determine what amount of damages were properly awardable. Indeed, the trial court came to its conclusion as to the $104,500 only after it briefly reopened proofs to garner some support for its one-third calculation on the mortgage payments. However, we deem the $104,500 figure to be based on too flimsy of a record to withstand appellate scrutiny. There is no evidence as to the value of the Zaragoza lots compared to the other lots making up the entire parcel, nor how much was financed to pay for these two lots, as opposed to the entire parcel. Accordingly, we vacate the trial court's award of $104,500 to Express, but remand for further proceedings on its claim for damages.[4]

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[4] It is also unclear from where the trial court obtained the $8,000 figure as the monthly interest paid on the mortgage, and it appears to be unsupported by the record. Mheisen testified that his average payments on the loan were $6,000 per month, the majority of which was interest. Thus, if on remand the trial court again awards as damages part of the interest payments on the mortgage, it should re-calculate the interest payment. Judge O'Connell is not at all certain that this methodology for awarding fraud damages has any merit. On remand the parties should brief this issue for the trial court. We also note that the trial court did not take into account the unpaid (if any) principal and interest payments on the Zaragoza land contract as a measure of damages, and on remand the trial court should consider this issue. *Jackson*, *supra*.

C. Foreclosure as a Remedy

Finally, Manuel asserts that the trial court, after compensating Express monetarily for its damages, erred in forbidding Manuel from foreclosing the mortgage. This argument lacks merit.

Foreclosure is an equitable remedy, and an action for foreclosure is subject to equitable defenses. See *Mitchell v Dahlberg*, 215 Mich App 718, 724; 547 NW2d 74 (1996), in which this Court stated:

> Michigan has permitted its courts to exercise their equitable powers to preclude forfeiture or foreclosure under unusual circumstances or where the party against whom the action has been brought has raised a valid fraud claim. See, e.g., *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 56-57; 503 NW2d 639 (1993) (recognizing that fraud, accident, or mistake would permit a court to equitably intervene in an action for statutory foreclosure by advertisement) [other citations omitted].

"A court acting in equity looks at the whole situation and grants or withholds relief as good conscience dictates." *McFerren v B & B Investment Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002) (internal quotation marks and citations omitted). "The clean hands maxim is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Id*. (internal quotation marks and citations omitted).

Here, the trial court found that Manuel had committed fraud when Manuel induced Express to enter into the purchase of Manuel's property, and to obtain a loan from BLC to do so, on the basis of Manuel's misrepresentation that a release existed from Saco and Abouna. Because fraud is a defense to an action for foreclosure, the trial court did not err in denying the foreclosure remedy to Manuel.

Affirmed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood